(1)

Supreme Court, U.S.
FILED
06-905 OCT 16 2006
OFFICE OF THE CLERK

No. 06-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2006

JEROME A. MAHER and JOHN R. GRAVEE,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORI

JOHN O. TUOHY
1400 N. Elmhurst Rd.
Mount Prospect, IL 60056
(847) 394-3653
Attorney for Petitioners

QUESTIONS PRESENTED

1. Should the Supreme Court allow a conflict to stand between the opinions of two different panels of the Seventh Circuit decided less than one month apart? The two opinions are in direct conflict defining mootness. In the instant case spent receivership assets make Plaintiffs' case moot. In Laskowski v. Spellings and Notre Dame 433 F3d 930 (7th Cir. 2006) a different panel held restitution was required if a trial proved the spent Congressional appropriation violated the separation of Church and State under the First Amendment.

2.In prior litigation Maher and Gravee v. Harris Trust 75 F3d 1182(7th Circuit 1996) after Plaintiffs herein made ERISA claims, the RTC the predecessor of the F.D.I.C. at p.9 of its brief informed the Seventh Circuit it "is not in this case challenging the deferred compensation agreement...claim against...(receivership) estate." The Seventh Circuit in holding Plaintiffs would be treated as other creditors, at 75 F3d1191 proclaimed " our holding does not suggest Plaintiffs have no contractual rights to their deferred compensation".

Can the Seventh Circuit now hold that Res Judicata bars Plaintiff's claims because of the Harris Trust case contrary to Kramer v. Chemical Construction Corp 456 US 461,481 (1982) which made applicable Res Judicata only when the

party against whom the earlier decision is being asserted had "full and fair opportunity to litigate the issue in question"?

Or can the Seventh Circuit's Res Judicata decision be upheld based on Maher v. United States 314 F3d 60 (Fed. Cir. 2002) which upheld the United States Court of Federal Claims decision holding that the Court had no jurisdiction to hear the case, in light of State of Montana v. United States 440 US 147 (1979) requiring jurisdiction of the case by the Court that issued the earlier decision that is being asserted as a Res Judicta bar?

3. Should the Supreme Court allow a conflict to stand between Seventh Circuit opinion denying the instant F.D.I.C. receivership creditors pro rata payment required by 12 USC 194 in conflict with the decision of the Ninth Circuit of First Empire Bank-New York v. F.D.I.C. 572 F2 1461 (9th Cir.) cert. den. 439 US 919 (1978),which required payment by the F.D.I.C. from its own funds for failure to pay creditors that weren't paid ratably out of the receivership funds exhausted by paying other unsecured creditors?

4. Should the Supreme Court allow a Seventh Circuit decision that conflicts with the Due Process requirements of notice and opportunity to be heard set forth in Tulsa Professional

Collection Services Inc. v. Joanne Pope Executrix 485 US 478 (1988) or must the F.D.I.C. give notice reasonably calculated to inform long known unpaid receivership creditors that the receivership was about to be terminated so that they could object?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDCTIONAL STATEMENT	2
CONSTITUTION AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	12
APPENDIX	

TABLE OF AUTHORITIES

U.S. CONSTITUTION

	Pages
Article III	17,18
Fifth Amendment, Due Process	15,16

CASES

	Pages
Alley v. Resolution Trust Corp., 984 F 2d 1201 (D.C. Cir. 1993)	19
Coit Indep. Joint Venture v. Federal Sav. Loan, 109 S Ct. 1361 (1989)	17,18
Commodity Futures Trading Comm. v. Schor, 433 US 833 (1986) (10th Cir. 1989)	17
Downriver Community Federal Credit Union v. Penn Square Bank, 879 Fed 754 (10th Circuit, 1989)	14,15
F.D.I.C. et al. v. U.S., 342 F 3d 1313 (D.C. Cir. 2003)	21
F.D.I.C. v. Gravee et al, 94 C 4589 (N.D. IL. 1994)	21
First Empire Bank – New York v. F.D.I.C., 572 F 2d 1361 (9thCir. 1978)	14
Hibernia Nat'l Bank v. F.D.I.C., 733 F 2d 1403 (10th Cir. 1984)	15
Kosuga v. Kelly, 257 F 2d 486 (7th Cir. 1958) Affirmed 358 US 516	9

Kremer v. Chemical Construction Corp.,
456 US 461 (1982) 21
Laskowski v. Margaret Spellings, Sec'y of Education
and U.S. of Notre Dame, 433 F 3d 930 (7th Cir.2006)
Rehearing denied 456 f 3d 702 12
Maher and Gravee v. Harris Trust,
90 C 5118 (N.D. IL. 1996) 4
Maher and Gravee v. Harris Trust, 75 F 3d 1182
(7th Cir. 1996) 8,9
Maher and Gravee v. F.D.I.C. 441F3d 522
(7th Cir. 2006) 12
Maher and Gravee v. United States, 48 Fed CL 585 (2001) 21
Maher v. United States, 314 F 3d 60 (Fed. Cir. 2002) 21
Office and Professional Emp. Inter v. F.D.I.C., 27 F 3d
598 (D.C. Cir. 1994) 15
State of Montana v. United States, 404 US 147 20
Tulsa Professional Collection Services v. Joanne
Pope Executrix of H. Everett Pope, Jr.,
485 US 478 (1988) 10,11
US v. Winstar Corp., 518 US 839 (1996) 6,7

STATUTES

12 USC 1821 (FIRREA)	16
12 USC 1823 (FIRREA)	9,13,15
29 USC 1140 et seq. (ERISA)	19
12 USC 194 (National Bank Act)	14

OTHER AUTHORITIES

House Report (Banking, Finance and Urban Affairs Committee, No 101-54 II, III and VII, 5/16/ and 6/2 and 6/8/89	
P.214, 215 (1989 U.S.C. C 86etseq)	17,18
Federal Register 47727 (7/29/99)	16
27 Williston 4th Edition 508	9

OPINIONS BELOW

The United States District Court for the northern District of Illinois opinion in his case dismissing Petitioner's Complaint is unreported and contained in the Appendix hereto.

The United States Court of Appeals for the Seventh Circuit affirming the dismissal of Petitioner's Complaint is reported at 44 F 3d 522 (7th Cir. 2006) and reproduced in the Appendix.

JURISDICTIONAL STATEMENT

Jurisdiction of the United States Supreme Court is provided for in 28 USC §1254 which provides for review of United States Circuit Courts of Appeal by filing a Petition for a Writ of Certiorari with the Clerk of the U.S. Supreme Court.

The Seventh Circuit decided this case on March 21, 2006. Petition for rehearing En Banc was, timely filed, denied by the Seventh Circuit on May 17, 2006.

(Prior to the expiration of ninety days from denial of Petitioners' Petition for Rehearing by the Seventh Circuit upon Petitioners' Application, Justice John Paul Stevens granted an extension of time to file the Petition for Certiorari until October 16, 2006).

CONSTITUTION INVOLVED

Article III, Section 1 "The Judicial Power of the United states, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Ks j

Fifth Amendment ". . ..Nor shall any person be deprived of life, liberty, or property, without due process of law...."

STATUTES INVOLVED

Employment Retirement Income Security Act

28USC 1140 et seq. ("ERISA")

U.S. Bank Code 12 USC §194

FIRREA 12 USC 1821, 1823

STATEMENT OF THE CASE

Petitioners, Jerome Maher and John Gravee, seek to enforce their employment agreement retirement and pension rights as guaranteed by ERISA 28 US C 1140 et. seq. Both were long time top management employees, and directors of a local Savings and Loan ("Horizon") located in a Chicago suburb, Wilmette, Illinois. Maher, the Vice-President of Horizon is now 72 years old – Gravee, the President is now 71 years old. The Petitioners have been trying to collect these benefits since 1990, when they sued the Harris Bank to enforce Employment Agreement retirement, severance and benefit rights, the Trustee of their retirement funds, and the Resolution Trust Corporation (R.T.C.). The Respondent Federal Deposit Insurance Corporation (F.D.I.C.) succeeded the R.T.C. as Receiver for Horizon on Jan.1, 1996. The R.T.C. notified Harris not to pay Maher and Gravee their benefits in Feb. 1990.

During this initial litigation to enforce Petitioners ERISA rights, R.T.C. made it clear to the U.S. District Court and the Seventh Circuit that, "The R.T.C. is not in this case challenging the deferred compensation agreement that the Plaintiffs had with Horizon in terms of their claim against the estate." (i.e. the receivership estate) but only the secular trust. Transcript of the proceedings before the Honorable James Burns, Maher and Gravee v. Harris Trust and Savings Bank and R.T.C. 90 C 5118 (May 28, 1992). At Page 40 of the R.T.C.'s brief in Harris the

R.T.C. repeated the above position telling the Seventh Circuit "The R.T.C. is not in this case challenging the deferred compensation agreement that the Plaintiffs had with Horizon in terms of their claims against the (Receiver's) estate." Parenthetical comment added. This R.T.C. brief was dated Sept. 21, 1995. In Harris Trust Maher and Gravee had sought to enforce the trust provided in writing in their employment agreement as a "secular trust." A secular trust put the assets of the trust out of reach of Horizon's creditors and out of the reach of the receivership estate. R.T.C. in Harris successfully objected to the Secular Trust which Petitioners no longer contest. On the day they seized Petitioner's employer Horizon on January 11, 1990[1] the R.T.C. on the same day created Horizon Savings Bank, F.S.B. (sometimes called "New Horizon"). The Receivership seized the assets of Horizon Federal Savings Bank (sometimes called "Old Horizon") and promptly on the same day the R.T.C. as Receiver of Old Horizon entered into a Purchase and Assumption Agreement with New Horizon. Simultaneously, the R.T.C. became Conservator of New Horizon, as set forth in Petitioner Appellant's Brief at P9 in the instant case before the Seventh Circuit. The Purchase and Assumption Agreement provided at Par. 2.1(f) and 4.8 that New Horizon would assume all liabilities for Old Horizon's Pension and Profit Sharing Plans if vested.[2] Maher and Gravee's retirement rights vested before the receivership was created in 1990.

The origin of Maher and Gravee's problems occurred as set out in the Complaint in the instant case in 1982 when Federal Home Loan Bank officials urged Maher and Gravee as the top officers of First Federal Savings and Loan Association of Wilmette, then a financially healthy institution to merge with three failing thrift institutions, creating Horizon Federal Savings Bank, successor to First Federal Savings and Loan Association of Wilmette. An F.D.I.C. predecessor was the Federal Savings and Loan Insurance Corporation (FSLIC) which had great financial problems at the time. This Court described the situation in U.S. v. Winstar Corp. 518 U.S. 839, 850 (1996):

(footnotes for page 5)

[1] This seizure took place 2 days after the Government's Office of Thrifts Supervision ("OTS"), published on Jan. 9, 1990, OTS Thrift Bulletin No. 380-2 a December regulation demanding that Horizon furnish a plan showing how it would become and remain financially a healthy institution without the use of supervisory goodwill. This regulation of the O.T.S. was mandated by the Congress when it passed the Financial Reform Recovery and Enforcement Act of 1989 (codified in scattered sections of 12 USC particularly 12 USC 1821 and 1823).

[2] Some other conditions were listed in Par. 2.1(f) and 4.8 but which are not relevant.

"F.S.L.I.C. had sufficient funds to make up the difference between a failed thrift's liabilities and assets, the Bank Board had to offer a "cash substitute" to induce a healthy thrift to assume a failed thrift's obligation."

The "cash substitute" was offered to Maher and Gravee for the new S.L., Horizon, as ~~supervisory~~ goodwill as stated in U.S. v. Winstar id 850:

"...thrift regulations let the acquiring institutions count supervisory goodwill toward their reserve requirements under 12 CFR §563.13 (1981)... in most cases the institution resulting from the transaction would immediately have been insolvent under federal standards ~~if goodwill~~ had not counted toward regulatory net worth" U.S. v. Winstar 518 U.S. at 850.

Regulations allowed acquiring institutions like Horizon to amortize this goodwill asset over up to forty years. Maher and Gravee, just as they were previously for a long time, as a condition of the merger remained the Vice President and President of the newly created and newly merged Horizon Federal. Immediately after the merger if top management of Horizon and or top employees of those retained from the three failed institutions were to exercise their employee retirement rights a financial drain would occur with Horizon. As a condition

of the merger, Maher and Gravee were required to abandon their First Federal Savings and Loan Association of Wilmette Retirement rights until Horizon, became more financially stable and to stay on as top management. The Employment Agreement Retirement and Pension rights were ultimately restored to Maher and Gravee, including deferred compensation. At first a non-secular trust was created at Harris Bank. Such a trust in the trade was called a Rabbi Trust. Later in 1988 this trust was converted to a Secular Trust. The difference of course put the trust out of the reach of their employer and their employer's creditors. This would avoid their being urged to give up their then vested retirement benefits as the Federal Home Loan Bank Board had previously required in the early 1980s as a condition of the merger with the three failing Savings and Loan Associations. Subsequently the Seventh Circuit held in Maher and Gravee v. Harris Trust, RTC et al. 75 F. 3d 1182 (7th Cir. 1996) the secular trust invalid because it put the Trust Assets out of reach of Horizon, and perforce its creditors. Unaffected was the legal remainder of Maher and Gravee's employment agreement. Indeed in the Harris Trust case the Seventh Circuit at 75 F 3d 1191 the Court said "our holding does not suggest Plaintiffs have no vested contractual rights to their deferred compensation." Such deferred compensation was part of their employment agreement which also contained a severance clause also known as savings clauses, which required the remainder of the agreement to

be enforced in the event any provision of the agreement was prohibited from being enforced. Maher and Gravee in their Seventh Circuit Appellant's Brief at P. 11 cited Williston, Section 13, 21, Fourth Edition, which cited as authority a Seventh Circuit case Kosuga v. Kelly 257 F 2d 48 (7th Cir. 1958) affirmed 358 US 5/6:

> "Although a contract may contain excessively restrictive promises which are unenforceable, the contract may not be invalidated in the entirety when its general purpose is lawful, moreover, although one of several contracts in restraint of trade is legally excessive the separable restrictive promises which are lawful will be enforced."

The Intent of Congress on the required method of treating creditors fairly has been thwarted by the F.D.I.C. and R.T.C.

As noted previously, in Harris Trust the R.T.C. led Maher and Gravee to believe they would be treated as other creditors and paid from the Receivership's estate. As a known creditor fundamental fairness required the F.D.I.C. to give Maher and Gravee the opportunity to object to termination of the receivership without a pro rata payment to them. Congress declared in 12 USC 1823(d)(3)(c) that the F.D.I.C. undertaking a Receivership of a Savings and Loan.

"... the Corporation (F.D.I.C.) shall continue to be the subject of the fiduciary duties and obligations of the Corporation as receiver to claimants against the insured depository institution

in receivership." (Parenthetical comment added.)

Such fiduciary duty to known claimants, Maher and Gravee, which the F.D.I.C. failed to observe, required more than publication in the Federal Register of notice of intent to terminate the receivership. In an opinion by Justice O'Connor (with Justices Brennan, White, Marshall, Stevens, Scalia and Kennedy, Justice Blackman concurring in the result) this Court held that "due process required that a known creditor or reasonably ascertainable creditors of the deceased be given actual notice of the pendancy of an estate and offered an opportunity to present objections." Tulsa Professional Collection Services Inc. v. Joanne Pope, Executrix of the Estate of H. Everett Pope, Jr., 485 US 478, 99 L. Ed 2d 565, 108 S. Ct. 1340 (1988). The notice given in Tulsa condemned by this Court to known creditor for hospital expenses for decedent's long stay immediately preceding his death was like the notice by the F.D.I.C. in the Federal Register, notice by newspaper publication of the estate's pendancy.

The Federal Register notices by the F.D.I.C. cannot be said to have complied with the due process standard set forth in the Tulsa case at 485 U.S. 484 which followed this Court's holding in Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 314 (1950):

"an elementary and fundamental requirement of due process in any proceeding which is to be recorded finality is notice reasonably calculated under all circumstances to apprise

interested parties of the pendancy of the action and afford them an opportunity to present their objections." (Emphasis added.)

It is submitted that when Congress passed the above cited fiduciary duty to creditors, Congress did not intend to attempt to make an exception to this Court's due process mandates.

Exhibits to Maher and Gravee's Appellant Brief shows that claims for their Employment Agreement retirement and pension benefits as alleged in the Complaint herein were timely filed in both the receiverships of Old Horizon and New Horizon, in 1990 and 1991 respectively. These claims were made after the F.D.I.C.'s predecessor notified them of the claim deadline. The receiver never denied these claims, which was also alleged in the Complaint.

REASONS FOR GRANTING THE WRIT

I

THE SEVENTH CIRCUIT HAS CREATED WITHIN THE CIRCUIT A CONFLICT BETWEEN THE INSTANT CASE MAHER AND GRAVEE V. THE F.D.I.C. AND THE COURTS OPINION IN LASKOWSKI V. MARGARET SPELLINGS, SECRETARY OF EDUCATION AND UNIVERSITY OF NOTRE DAME INTERVENOR DEFENDANT. 443 F 3d 930 (7th Cir. 2006). Petition for Rehearing denied. 456 F 3d 702. (7/26/06)

In both the above cases Petitions for Rehearing En Banc were denied. Maher was denied on May 17, 2006. The first part in Maher the Court held in an opinion by Judge Manion that the case is moot "... since the receivership is now terminated and without assets there is no possible relief for this court to order Maher v. F.D.I.C. 441 F 3d 522, 526 (7th Cir. 2006). In the University of Notre Dame case Notre Dame contended that the one time Congressional appropriation of $500,000 had been spent by allocating such funds to other institutions. Judge Posner's opinion reversed the District Court's decision dismissing the case because of mootness. Even though the Appellant Plaintiff had not asked for Restitution, Judge Posner remanded the case to determine if restitution was warranted. Judge Posner submitted that if the appropriation by Congress to Notre Dame violated the

Establishment Clause of the First Amendment, the remedy of restitution could be implemented. These two Seventh Circuit opinions are in conflict.

II

THE SEVENTH CIRCUIT'S MAHER DECISION CONFLICTS WITH CONGRESSIONAL INTENT ON DEALING WITH CREDITORS.

The Complaint alleged all other creditors of Horizon were paid and Petitioners were not. FIRREA provides at 12 USC 1823(d) (3) (C):

"Fiduciary responsibility the Corporation (i.e. the F.D.I.C.) shall continue to be subject to the fiduciary duties and obligations of the Corporation as receiver to claimants against the insured depository institution in receivership." (Parenthetical comment added.)

III

THE SEVENTH CIRCUIT'S MAHER DECISION PROHIBITING PAYMENT TO PETITIONERS IS IN CONFLICT WITH THE NINTH CIRCUIT.

The Ninth Circuit was faced with the problem of what happens when the F.D.I.C. as a receiver prefers some unsecured creditors over other unsecured creditors.

The Ninth Circuit held that the F.D.I.C. itself had to pay creditors that the F.D.I.C. as receiver failed to pay ratable under 12 USC §194 which required the F.D.I.C. as a receiver to pay creditors ratably. The Ninth Circuit in their case specifically held:

"In our judgment it could not have been the congressional intent, upon balance, to have fiscal integrity of the deposit insurance fund (which can be adequately protected by other more equitable means) outweigh the policy of equitable and ratable payment of creditors in this manner and to permit the F.D.I.C., whenever it felt its action to be reasonable and to serve to protect the deposit insurance fund against loss, to prefer some creditors over others paying some in full while others received little or nothing." First Empire Bank -New York v. FDIC, 572 F 2d 1361 (9th Cir.), Cert. denied 439 U.S. 919 (1978).

The F.D.I.C. thinks First Empire has enough viability to cite it approvingly in their Reply Brief at Page 18 in F.D.I.C. et al v. U.S., 342 F 3d 1313 (Cir. 2003) along with Downriver

Community Federal Credit Union v. Penn Square Bank, 879 F. 2d 754, 762 (10th Cir. 1989) ("The FDIC, when acting as a receiver for an insolvent bank, cannot prefer some creditors over others; rather, all creditors must share in a ratable distribution of the insolvent bank's assets' Hibrnia Nat'l Bank v. FDIC, 733 F. 2d 1403, 1407 (10th Cir. 1984)." 12 Reply Brief P. 18

Moreover in Office and Professional Emp. Inter. F.D.I.C. 27 F3d 598, 601 (D.C. Cir. 1994) although 12 USC §1821 (e) (4) (FIRREA) gives the Receiver the power to repudiate certain contracts within a reasonable time after being appointed receiver it cannot repudiate employment contracts that provide for severance benefits.

IV

THE TERMINATION OF THE RECEIVERSHIP WITHOUT ACTUAL NOTICE TO MAHER AND GRAVEE AFFORDING THEM AN OPPORTUNITY TO OBJECT BECAUSE THEIR CLAIMS WERE UNPAID VIOLATED DUE PROCESS AND THIS COURT'S DECISION IN TULSA PROFESSIONAL COLLECTION SERVICES INC. V. JOANNE POPE EXECUTRIX OF H. EVERETT POPE, JR. 485 US 478 (1988) AS WELL AS THE CONGRESSIONAL INTENT OF 12 USC 1823

During oral argument for the first time the F.D.I.C.'s through their attorney asserted that notice was published in the Federal Register Co. on 7/29/99 for "all interested Parties of the Termination of Certain Receivership by the F.D.I.C. in the Third and Fourth Quarters of 1999." The record in the instant case shows that according to the F.D.I.C.'s Supplemental Appendix, filed with the Seventh Circuit in the instant case, the certificate of termination of the Horizon receivership by the F.D.I.C was not signed until 12/11/2001 almost 2 years after the Federal Register publication. It was effective 1/1/2002. Maher and Gravee were at all times known by the F.D.I.C. and their predecessors to be creditors of the receivership no notice reasonably calculated to inform these creditors of the finality of the receivership was ever given to them contrary to due process.

V

FAILURE TO ENFORCE MAHER AND GRAVEE'S EMPLOYMENT ARGREEMENT PENSION AND SEVERANCE RIGHTS VIOLATES CONGRESSIONAL INTENT SET FORTH IN FIRREA 12 USC 1821 AND THIS COURT'S DECISIONS IN THE SCHOR AND COIT CASES.

FIRREA provides in 12 USC 1821(d)(6)(A) that, contrary

to the Judge Manion's opinion Congress did not require Maher and Gravee to exhaust administrative remedies because before the Receivership of New Horizon began Petitioners had their lawsuit pending. New Horizon had been assigned and assumed liability to pay retirement benefits.

In Commodity Future Trading Comm. v. Schor, 433 US 833 (1986), the Court was "... squarely faced with the question whether the CFTC's assumption over common law counterclaims violates Article III of the Constitution." Schor at 478 US 847, the Court held, "Congress may make available a quasi-judicial mechanism through which willing parties may at their option elect to resolve differences." (Emphasis added.)[3]

In Coit Indep. Joint Venture v. Federal Sav. Loan, 489 US 561 103 L. Ed 2d 802, 109 S. Ct. 1361 (March 23, 1989). This case as well as Shor were specifically considered by Congress and which sought to harmonized these with provisions of FIRREA passed by it on August 31, 1989.[4]

Coit case was "to resolve whether F.S.L.I.C. has exclusive authority to adjudicate the validity of creditors state law claims against failed savings and loan associations under a F.S.L.I.C. receivership." 109 S. Ct at 1366.

After finding that there was no finding federal law exclusively occupies the field to the exclusion of substantive state law or enforcement of state law with federal substantive policies this Court held "...FSLIC has no statutory authority to divest the

Courts of subject matter jurisdiction over these claims." Coit at 1375. This Court further said the claims raised on Coit involve private rights which are "... at the core of matters normally reserved to (constitutional) Article III courts." Id 1371 (Citations omitted and parenthetical comments added.)

Judge Manion's Seventh Circuit opinion is in error when it asserts we didn't exhaust our administrative remedies. If a lawsuit was pending before New Horizon went into Receivership, no administrative remedies need to have been exhausted.

---

[3] Justices Brennan and Marshall Schor 478 US 865 believed one couldn't waive the right to an article III tribunal.

---

[4] House Report (Banking Finance and Urban Affairs Committee) No 101-54 II, III and VII dated May 16, June 2, 8, 1989 p. 214, 215 (1989 USC C. 86 et seq.)

VI

FAILURE TO ENFORCE MAHER AND GRAVEE'S EMPLOYMENT AGREEMENT PENSION AND SEVERANCE RIGHTS CONFLICT WITH ALLEY V. RESOLUTION TRUST IN THE D.C. CIRCUIT COURT OF APPEALS

Petitioners in the District Court and Court of Appeals alleged that failure to pay was contrary to ERISA. The Employment Retirement Income Security Act, 29 USC 1140 et. seq. protects employee benefits including severance pensions and rewards for past services. In Alley v. Resolution Trust Corp., 984 F 2d 1201 (D.C. Cir. 1993) the then Circuit Judge Ruth Bader Ginsberg in the Court's opinion held that severance and employment retention benefits were enforceable under ERISA. Moreover Alley asserts that ERISA trumps FIRREA. To conclude otherwise would mean that the Seventh Circuit had no jurisdiction to hear the instant appeal. In trumping FIRREA, ERISA must be provided for and obeyed when terminating a receivership in a manner inconsistent with ERISA and due process as asserted above in applying notice requirements of the Court's decision in the Tulsa case.

VII

THE SEVENTH CIRCUIT CRITERIA FOR RES JUDICATA CONFLICTS WITH THE STANDARDS REQUIRED BY THIS COURT AND ILLINOIS. The Manion opinion at Page 6 declared the criteria "(1) as final judgment on the merits (2) an identity of the issues of the lawsuit and (3) an identity of the parties or their privies." This Court added to the applicable criteria that the Courts to be used to implement Res Judicata must have been determined to be a Court of competent jurisdiction. State of Montana v. United States, 440 US 147 (1979).

In the Seventh Circuit Maher and Gravee v. Harris Trust R.T.C. et al, 75 F. 3d 1182 1191 (7th Cir. 1996) the Court said in striking down the Secular Trust "... our holding does not suggest Plaintiffs have no vested contractual rights to their deferred compensation." So when that case was decided in 1996, Maher and Gravee's remaining employment contract rights were in tact, and not barred. The R.T.C. told the Seventh Circuit in their brief in Harris on Sept. 21, 1995 at page 40 "The RTC is not in this case challenging the deferred compensation agreement that the Plaintiffs had with Horizon in terms of their claims against the ("Receivers") estate." (Parenthetical comment added.) The R.T.C. sued Maher and Gravee for breach of their employment

contract and a Tort claim F.D.I.C. v. Gravee, et al., 94 C 4589 (N.D. IL 1994). Maher and Gravee counterclaimed for breach of their employment contract. On May 28, 1997 the F.D.I.C. as successor to the R.T.C. took a voluntary non-suit, without prejudice, the same day the District Court transferred Maher and Gravee's employment contract counterclaims to the United Stated Court of Federal Claims. The United Stated Court of Federal Claims dismissed Maher and Gravee's employment contract claims asserting that it did not have jurisdiction. Maher and Gravee v. United States, 48 Fed. CL 585 (2001). This was contrary to Judge Plunkett's rationale when he transferred the case there from the U.S. District Court. Judge Plunkett ruled that he lacked jurisdiction and transferred the case to the United States of Federal Claims. The U.S. Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Dismissal finding also there was no jurisdiction to hear the case. Maher v. United States, 314 F. 3d 60 (Fed. Cir. 2002)[5]

In Kremer v. Chemical Construction Corp., 456 U.S. 461, 481 in 22 (1982) this Court instructs, that the doctrine of Res Judicata is applied only when the party against whom the earlier

---

[5] The instant case was then filed prior to the denial certiorari in Maher v. U.S., 314 F. 3d 60.

decision is being asserted had "full and fair opportunity to litigate the issue in question." No full and fair opportunity exists to litigate if Maher and Gravee's case was transferred to a Court which holds it has no jurisdiction to hear the case because of failure to show a contract with the United States or agency thereof. Moreover, in Harris Trust, the right to participate as a creditor in the receivership estate was acknowledged.

CONCLUSION

For the foregoing reasons Petitioners, Jerome Maher and John Gravee, respectively request that their Petition for a Writ of Certiorari be granted.

JEROME MAHER and JOHN GRAVEE

By:

JOHN O. TUOHY, Their Attorney

JOHN O. TUOHY
1400 N. Elmhurst Road
Unit 114
Mount Prospect, IL 60056
847-394-3653
773-972-8885
IL ATTY. #2866501

APPENDIX

In The
United States Court of Appeals
for the Seventh Circuit

No. 05-1701

Jerome A. Maher and John R. Gravee,

Plaintiffs-Appellants, v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 C 6828—Rebecca R. Pallmeyer, Judge.

ARGUED FEBRUARY 8, 2006—DECIDED MARCH 21, 2006

Before MANION, KANNE, and EVANS, Circuit Judges.

MANION, Circuit Judge. Jerome Maher and John Gravee sued the Federal Deposit Insurance Corporation ("FDIC") seeking pension trust funds from their employment with a failed bank. The district court determined that res judicata barred the suit. Maher and Gravee appeal. Because the case is moot, we dismiss.

Additionally, to encourage finality in this litigation, we alternatively affirm the district court's judgment that Maher's and Gravee's daims are barred by res judicata, or claim preclusion. Jerome Maher served as the vice-president and John Gravee as the president of First Federal Savings and Loan of Wilmette, Illinois ("First Federal"). First Federal merged with three failing financial institutions in 1982, forming Horizon Federal Savings Bank ("Horizon"). Maher and Gravee became the top two officers of the new institution. The merger required Maher and Gravee to relinquish their pension plans established at First Federal, with the under-standing that a new plan could be established at Horizon once the new institution gained financial stability. In 1985, Horizon did create a new plan for them: a "rabbi trust," in which the principal remained a general asset of Horizon, allowing Horizon's creditors to reach the trust assets in the event of bankruptcy or some other event of default. Two years later, the trust was amended to create a "secular trust," which placed the trust assets with an independent trustee, beyond the reach of Horizon's creditors. Subsequently, on January 11, .1990, the federal Office of Thrift Supervision ("OTS") declared Horizon insolvent. The OTS appointed the Resolution Trust Corporation ("RTC") as Horizon's receiver. The RTC terminated Maher and Gravee on June 28, 1990.

Maher and Gravee then requested payment of the pension trust funds from its independent trustee. After the RTC ordered the trustee not to disburse the funds, Maher and Gravee filed suit

against the trustee, the RTC, and Horizon seeking the assets held in the trust funds. A district court held that the secular trust violated 12 C.F.R. § 563.39 (1987) and was therefore invalid. Maher v. Harris Trust & Say. Bank, No. 90-C-5118, 1994 WL 682625 (N.D. Ill. Dec. 5, 1994). This court affirmed that decision. Maher v. Harris Trust & Say. Bank, 75 F.3d 1182, 1191 (7th Cir. 1996) ("[T]he property interest plaintiffs acquired as a result of the trusts are void and [ ] the trust assets will be shared by all persons with proper claims against Horizon.").

The RTC, which was succeeded by the FDIC, commenced separate litigation, suing Maher, Gravee, and the directors of Horizon for gross negligence. F.D.I.C. v. Maher, 966 F. Supp. 622 (N.D. Ill. 1997). Maher and Gravee filed counterclaims against the RTC, OTS, and FDIC seeking the trust funds and other compensation. After a settlement with the other directors, Maher's and Gravee's counterclaims were transferred to the Court of Federal Claims, where they were dismissed for failure to state a claim. Maher v. United States, 48 Fed. Cl. 585, 587 (Ct. Cl. 2001) ("[T]he facts [Maher and Gravee] have pled, even when taken at face value, are insufficient, as a matter of law, to make out a contract claim against the United States."). The Federal Circuit affirmed. Maher v. United States, 314 F.3d 600 (Fed. Cir. 2002).

In this phase of the dispute, Maher and Gravee sued the FDIC "as Successor Receiver of Horizon Federal Savings Bank" seeking "enforcement of their remaining employment and pension benefits." They claim that the invalidation of the secular trust

resurrected the rabbi trust, and they seek payment of those funds. The FDIC filed a motion to intervene in its corporate capacity, as opposed to its capacity as a receiver, to defend the lawsuit; this distinction is important because the FDIC's liability varies with its capacity. In its corporate capacity, the FDIC's liability for claims against a receiver is limited to the assets of the receivership. 12 U.S.C. § 1821(i)(2). The district court permitted the intervention and determined that the claims against the FDIC were barred by res judicata. Maher and Gravee appeal. The FDIC argues on appeal that this court lacks subject matter jurisdiction, that the claims are moot, and that they are barred by res judicata.

II.

We first address this court's subject matter jurisdiction. The complaint states generally that "Defendants [sic] failure to honor [Maher's and Gravee's] pension rights is a violation of federal law." The complaint then cites to the "Employe[e] Retirement Income Security Act, 29 U.S.C. § 1140 et seq. (ERISA)." Earlier in the complaint, Maher and Gravee also refer to the Financial Institutions Reform Recovery and Enforcement Act (FIRREA). On appeal, they claim that both acts provide a basis for subject matter jurisdiction.

Under FIRREA, a claimant can file an administrative claim with the receiver, which then has 180 days to allow or deny the claim. If the receiver denies or does not render a decision within 180 days, the claimant has 60 days to file suit. Federal courts lack

jurisdiction to address claims that fail to comply with FIRREA's administrative claims process. 12 U.S.C. § 1821(d)(6)(A); Maher, 75 F.3d at 1190-91; Capitol Leasing Co. v. F.D.I.C., 999 F.2d 188, 193 (7th Cir. 1993). Maher and Gravee filed this lawsuit more than a year after the termination of the receivership and more than a decade after they claimed to have filed administrative claims on April 12, 1990. Thus, since they failed to comply with the administrative procedures, FIRREA does not provide subject matter jurisdiction over these claims.

Nonetheless, Maher and Gravee also claim jurisdiction based on ERISA. Although they only describe a claim under ERISA in cursory fashion, they do invoke federal jurisdiction on this basis. Even if the complaint may fail to state a claim upon which relief may be granted, the court has subject matter jurisdiction over the disposition of the ERISA claim. Health Cost Controls v. Skinner, 44 F.3d 535, 537 (7th Cir. 1995) ("[I]f a plaintiff fails to properly allege a claim for relief brought under a federal statute, the case should be dismissed under Federal Rule of Civil Procedure 12(b)(6), rather than Rule 12(b)(1) [for lack of subject matter jurisdiction]." (citation omitted)); Kolupa v. Roselle Park Dist., 438 F.3d 713, No. 05-2925, 2006 WL 306955, (7th Cir. Feb. 10, 2006) ("[C]omplaints need not plead facts and need not narrate events that correspond to each aspect of the applicable legal rule."); see also Primax Recoveries, Inc. v. Gunther, 433 F.3d 515, 517 (6th Cir. 2006) ("[A] federal court has subject-matter jurisdiction, even if the plaintiff is unable to state a claim upon

which relief can be granted."). Therefore, we have subject matter jurisdiction over the ERISA claims.

Maher and Gravee, however, cannot overcome the next hurdles of mootness and res judicata. "Under Article III of the Constitution, the exercise of federal judicial power depends on the existence of a justiciable case or controversy; federal courts do not have jurisdiction to re-view moot cases." Buckley v. Archer-Daniels-Midland Co., 111 F.3d 524, 526 (7th Cir. 1997) (citation and internal quotation omitted). This court has stated that "[a] case is moot if there is no possible relief which the court could order that would benefit the party seeking it." In re Envirodyne Indus., 29 F.3d 301, 303 (7th Cir. 1994) (citation omitted).

Maher and Gravee brought this suit against the FDIC, which appears only in its corporate capacity. In that capacity, the FDIC is not liable for any other actions taken by the FDIC in its capacity as a receiver. See F.D.I.C. v. Roldan Fonesca, 795 F.2d 1102, 1109 (1st Cir. 1986). The Horizon receivership was terminated on January 1, 2002, prior to the filing of this case. Advanced notice of the termination was published in the Federal Register. Notice, 64 Fed. Reg. 41121 (July 29, 1999). With the termination, the receivership ceased to exist as a legal entity and the FDIC in its corporate capacity assumed only limited liabilities from the receiver, which cannot exceed the liquidated assets of Horizon. 12 U.S.C. § 1821(i)(2). Presently, as the FDIC succinctly states in its brief, "[n]o assets remain to satisfy a judgment in [ ] favor [of Maher or Gravee]." Without any

receivership assets, there can be no recovery from the FDIC in its corporate capacity. See First Ind. Fed. Say. Bank v. F.D.I.C., 964 F.2d 503, 507 (5th Cir. 1992) ("Congressional policy requires that creditors of failed institutions look only to the assets of the institution for recovery of their losses, and not to the taxpayers."). Since the FDIC's corporate liability is limited to the assets of the receivership, and since the receivership is now terminated and without assets, there is no possible relief for this court to order for Maher or Gravee against the FDIC in its corporate capacity. We therefore dismiss for lack of a justiciable case or controversy.

Alternatively, even if the court were able to order relief, the claims are clearly barred by the doctrine of res judicata, or claim preclusion. In fact, this case presents a paradigm of the doctrine. As this court has instructed, "fries judicata bars suits where there is [1] a final judgment on the merits; [2] an identity of the issues of the lawsuit; and [3] an identity of the parties or their privies." Hamdan v. Gonzales, 425 F.3d 1051, 1059 (7th Cir. 2005) (internal quotation and citation omitted). Res judicata also bars litigation of claims that "could have been raised" in the previous litigation, but were not. Golden v. Barenborg, 53 F.3d 866, 869-70 (7th Cir. 1995).

The FDIC, Maher, and Gravee were parties in previous litigation that rendered a final judgment on the merits. Maher and Gravee had the opportunity to raise these claims in not one, but two previous lawsuits. First, Maher and Gravee sued the trustee of the secular trust and Horizon's receiver (whose liability was

ultimately assumed by the FDIC), seeking the pension funds. Notably, that litigation concluded that the secular trust was invalid and even addressed claims about the rabbi trust, stating that; Plaintiffs seek as alternative relief, a declaration that the provisions of the rabbi trust be revived under the doctrine of substitution of contracts. However, the authorities plaintiffs cite do not support this novel contention and I decline to adopt it. Furthermore, revival of the rabbi trust would not change plaintiffs' rights with respect to the assets of the trust. Beneficiaries of a rabbi trust established by a thrift are unsecured creditors of the thrift; the receiver is entitled to the trust assets. Maher, 1994 WL 682625, at *2, aff d Maher, 75 F.3d at 1191.

Next, in the Court of Claims, Maher and Gravee brought a claim against the United States for its actions "through the RTC, OTS, and FDIC." Maher, 314 F.3d at 602. The Federal Circuit, in affirming the Court of Claims's decision dismissing the claim, stated that; To the extent Maher and Gravee have a claim for breach of their employment contracts, including a claim for payment of the proceeds of the deferred compensation trust, established for them by Horizon, such a claim would be directly against Horizon through its receiver, not indirectly through the government. Maher and Gravee made a failed attempt at such a claim more than ten years ago when they sued Harris Bank, Horizon, and the RTC. See Maher, 75 F.3d at 1187, 1190-91. Moreover, under FIRREA, persons having claims against the assets of a thrift are subject to the administrative claims review

process prescribed by 12 U.S.C. § 1821(d). The government argues that Maher and Gravee have failed to timely follow these procedures; Maher and Gravee argue otherwise. This issue is not framed by the Amended Complaint and is not properly before us on appeal.

Id. at 607 n.2. The Federal Circuit then concluded that "[t]he Amended Complaint in this case does not establish a cause of action against the government for . . . payment of the proceeds of the deferred compensation trusts." Id. at 607.

Maher and Gravee pursued or could have pursued claims on the secular and rabbi trusts in these previous cases. Their appellate brief even admits this continuing endeavor, stating that "[nor 15 years of litigation; [Maher and Gravee] have sought to enforce these contractual rights." Under the doctrine of res judicata, Maher and Gravee are not entitled to seek repeatedly the pension funds on marginally different theories. Therefore, even if this case presented a justiciable case or controversy, their claims would be barred by the doctrine of res judicata.

III.

Because Maher and Gravee fail to present a justiciable controversy, we DISMISS. Alternatively, we AFFIRM the district court's conclusion that the claims are barred by the doctrine of res judicata.

A true Copy:

Teste:

_____

Clerk of the United States Court of

Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEROME A. MAHER and JOHN R. GRAVEE,
Plaintiffs,
v.
FEDERAL DEPOSIT INSURANCE
Judge Rebecca R. Pallmeyer CORPORATION,
Defendant.

No. 03 C 6828
JUDGE REBECCA R. PALLMEYER

ORDER

Unsatisfied with the results of two previous lawsuits, Plaintiffs Jerome Maher and John Gravee have brought this third action against the Federal Deposit Insurance Corporation ("FDIC"), as successor in interest to their former employer, Horizon Federal Savings Bank ("Horizon"), seeking recovery of deferred compensation benefits allegedly owed under their employment contracts, The FDIC has moved to dismiss the complaint on several grounds, including that the claims are barred by the doctrine of res judicata. For the reasons set forth here, the motion is granted.

BACKGROUND

Maher and Gravee served as officers and directors of Horizon, a federally chartered and insured mutual savings and loan association in Wilmette, Illinois. (Cmplt. ¶ 8.) See Resolution Trust Corp. v. Gravee, No. 94 C 4589, 1995 WL 75373, at *1 (N.D, III. Feb. 22, 1995). Horizon was formed in 1982 when First Federal Savings and Loan Association of Wilmette merged with three failing Institutions at the urging of officials from the Federal Home Loan Bank Board ("FHLB"). (Cmplt. ¶¶ 5, 6.) As part of the merger agreement, government representatives from the FHLB and the Federal Savings & Loan Insurance Corporation required Plaintiffs to relinquish their existing pension plans with the understanding that new plans would be established once the new entity, Horizon, achieved financial stability. (Id. 11117, 9.)

A. The Deferred Compensation Trusts

Beginning in 1984, Horizon approved a number of speculative loans for commercial real estate projects. Resolution Trust Corp., 1995 WL 75373, at *1. Around the same time, Horizon established a deferred compensation trust for Plaintiffs, pursuant to which they would receive a certain amount of trust proceeds each year upon termination or death. (Cmplt. ¶ 10); Maher v. Harris Trust and Savings Bank, 75 F.3d 1182, 1185 (7th Cir. 1996). The trust was set up as a "Rabbi Trust," meaning that the principal of the trust remain[ed) a part of the general assets of

the corporation and [wa)s reachable by creditors." (Id. ¶ 10,) In 1987, Horizon converted the Rabbi Trust to a "Secular Trust." As a result, the trust property became separate from Horizon's general assets and was no longer available to Horizon's creditors. (Id. ¶ 11); Maher, 75 F.3d at 1185.

B. The Harris Trust Litigation

On January 11, 1990, the Office of Thrift Supervisor ("OTC") seized control of Horizon,

which had lost in excess of $50 million on its speculative loans, and appointed the Resolution Trust

Corporation ("RTC") as Receiver,' (Id. ¶ 13); Resolution Trust Corp., 1995 WL 75373, at "1. The

RTC discharged Plaintiffs on January 29, 1990, and on April 12, 1990, Plaintiffs filed claims with

the RTC to collect deferred compensation benefits under the terms of the Secular Trust. Plaintiffs

allege that the RTC never ruled on their request for benefits. (Id. ¶ 15; Ex. A to Intervener Reply.)2

In August 1990, Plaintiffs filed suit against the RTC and Harris Trust and Savings Bank, the trustee of the Secular Trust, in the Circuit Court of Cook County seeking to enforce the terms of the trust and recover their deferred compensation benefits. (Id.) The RTC counterclaimed for the return of bonuses paid to Plaintiffs in 1989 and removed the case to federal court. (Id.); Maher, 75 F.3d at 1187. Following a bench trial, the district court entered judgment in favor of the RTC,

1. The FDIC is the statutory successor to the RTC.

2. The Intervener's Reply Memorandum in Support of its Motion to Dismiss is cited as "Intervener Reply, at finding that both the Secular Trust and the bonuses violated federal regulations. See Maher v. Harris Trust and Savings Bank, No. 90 C 5118, 1994 WL 682625, at *3 (N.D. Ill. Dec. 5, 1994) (denying Plaintiffs' claim to vested rights in the trust assets and noting that "the secular trust was Illegal and void from its inception"). The Seventh Circuit affirmed the judgment on appeal. Maher, 75 F.3d 1182.

C. The RTC Litigation

While Plaintiffs' appeal in the Harris Trust case was pending, the RTC filed suit against the former officers and directors of Horizon, Including Plaintiffs, alleging that they were grossly negligent in carrying out their duties. Federal Deposit Ins, Corp. v. Gravee, 966 F. Supp. 622, 628 (N.D. Ill. 1997). Plaintiffs filed a counterclaim in this "RTC litigation" to recover employment benefits under a breach of contract theory. (Cmplt. ¶ 16.) The RTC reached a settlement agreement with all defendants except Maher and Gravee; rather than proceed against the two individuals, the RTC dismissed the case without prejudice, The court transferred Plaintiffs' counterclaims to the United States Court of Federal Claims, but noted that the RTC could reinstate

its case in the event Maher and Gravee prevailed in that action. (Gravee, Minute Order of 5/29/97, Doc, No. 198.)

Plaintiffs filed an amended complaint in the Court of Federal Claims (the "Maher litigation"), naming the United States as a defendant, Plaintiffs alleged that the United States, acting through the RTC, the OTS, and the FDIC, (1) breached a contract between the government and Horizon to which Plaintiffs were third-party beneficiaries; and (2) breached an implied-in-fact contract with Plaintiffs. (Cmplt. ¶ 19). See also Maher v. United States, 314 F.3d 600, 602 (Fed. Cir. 2002). Though the Seventh Circuit had already confirmed that the Secular Trust was illegal, Plaintiffs again sought to enforce the trust "as part and parcel of the merger contract with the Federal Government agency ([FHLB]) back when the merger took place in 1982." (Id, If 17.) The Court of Federal Claims dismissed the case for failure to state a claim. Maher v. United States, 48 Fed. CI. 585 (2001). The Federal Circuit affirmed the dismissal on appeal and the Supreme Court denied certiorari. (Cmplt. 11119-20); Maher, 314 F,3d at 607 ("Maher and Gravee have not pled sufficient facts to establish that they are intended third-party beneficiaries of the merger agreement between the government and Horizon, or that they have an implied-in-fact contract with the government for employment and pension benefits"), cert. denied Maher v. United States, 540 U.S. 821 (2003).

D. The Instant Lawsuit

On October 1, 2003, Plaintiffs filed the instant lawsuit again seeking to recover their deferred compensation benefits, this time under what appears to be a theory of breach of vested rights. (Cmplt. ¶¶ 4, 21, 27.) Recognizing that the Secular Trust has been declared void, Plaintiffs now claim that they are entitled to their benefits payable out of Horizon's general assets instead of from the assets of the trust. (Id. ¶¶ 21, 27.) Plaintiffs also make a vague reference to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 of seq. The FDIC has moved to dismiss this latest lawsuit on three grounds: (1) the claims are barred by the doctrine of res judicata; (2) Plaintiffs failed to exhaust their administrative remedies under the Financial Institution Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821(d); and (3) the action Is moot because the Horizon receivership was terminated as of January 1, 2002 and there are no assets and no institution from which Plaintiffs could recover, The court finds that res Judicata is dispositive here and grants the motion on that basis.

DISCUSSION

The doctrine of res judicata is designed to ensure the finality of decisions by prohibiting parties from relitigating issues that were decided In a prior lawsuit, as well as any issues that could have been raised Ina prior lawsuit. Golden v. Barenborg, 53 F,3d 866, 869-70 (7th Cir. 1995); Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986). For res judicata to apply, there

must be "(1) judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action between both suits. Brzostowski v. Laic/law Waste Sys., Inc., 49 F.3d 337, 338 (7th Cir. 1995). Causes of action are similar for purposes of res judicata if they have "a single core of operative facts which gives rise to a remedy." Roboserve, Inc. v. Kato Kagaku Co., 121 F.3d 1027, 1034 (7th Cir. 1997) (quoting Golden, 53 F.3d at 869).

The FDIC contends that res judicata bars Plaintiffs' claims for deferred compensation benefits because those claims were already litigated — or could have been litigated — in the Harris Trust, RTC, and Maher lawsuits. Plaintiffs first argue that Defendant has waived this defense by failing to raise it in those earlier proceedings. (Pl. Resp., at 11) (citing Arizona v. California, 530 U.S. 392, 410 (2000) ("res judicata [is] an affirmative defense ordinarily lost if not timely raised").) This argument is misplaced here, First, Defendant's alleged failure to raise the res judicata defense in earlier lawsuits does not bar that defense in this case. The Arizona case is obviously distinguishable: the State parties in that case attempted to raise res judicata for the first time many years into an ongoing action that had produced two prior rulings from the Supreme Court. Here, conversely, Defendant has raised the defense at its first available opportunity in a motion to dismiss.

There is no dispute that Plaintiffs and either the RTC or the FDIC were parties to the Harris Trust, RTC, and Maherlitigations,

and that the cases resulted in final judgments on the merits. Plaintiffs argue, however, that their current claims "sprang forth as a separate cause of action only after the Secular Trust provision was held invalid." (Pl. Resp., at 12.) In Plaintiffs' view, "there has been no litigation concerning the enforcement of the remainder of the Plaintiffs[']' employment agreements after the secular trusts were found unenforceable." (Id. at 12.) Assuming this is true, the argument still falls because Plaintiffs could have asserted the vested contract and ERISA claims in the earlier cases as alternative theories of recovery. Indeed, this is common practice in litigation where, as Plaintiffs discovered, courts do not always agree with a party's primary theory of relief. Plaintiffs chose not to raise their current claims, which arise out of the same core of operative facts as the earlier ones, and cannot now be allowed a "second bite of the apple.'" Shaver v. F.W. Woolworth Co., 840 F.2d 1361, 1368 (7th Cir. 1988); Golden, 53 F.3d at 869-70.

It is worth noting that even if Plaintiffs' claims were not barred by res judicata, they are nonetheless barred for failure to exhaust administrative remedies. FIRREA sets forth a detailed claims process that requires a claimant to first file a claim with the RTC,' which then has 180 days to respond. If the'RTC disallows the claim or fails to respond, the claimant has 60 days to file suit. 12 U.S.C. §§ 1821(d)(5)(A)(i),1821(d)(6)(A). Plaintiffs filed claims with the RTC on April 12, 1990 (Cmplt. IT 15); they filed this lawsuit in October 2003, some 13 years too late.

CONCLUSION

For the reasons stated above, the FDIC's motion to dismiss Is granted.

ENTER:

Dated: February 15, 2005

Rebecca R. Pallmeyer
United States District Judge

3. Plaintiffs suggest that a former RTC attorney, Wm. Carlisle Herbert, admitted during the Harris Trust litigation that Plaintiffs "were entitled to their deferred compensation agreements and the contractual rights that existed under those agreements." (PI. Resp., at 13) (citing "trans. 298, 299.") Plaintiffs have not provided any context for this statement or a copy of the cited transcript pages. In any event, statements made during proceedings that occurred more than ten years ago are not relevant to this action and in no way demonstrate that Plaintiffs are entitled to deferred compensation benefits under a vested contract or ERISA theory, To the contrary, any such theories are barred due to Plaintiffs' failure to raise them in the earlier proceedings.

4. Administrative claims must now be filed with the FDIC because the RTC no longer exists. At the time Plaintiffs filed their claims, however, the RTC was still the entity charged with providing a response.